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9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**
 11 **SAN FRANCISCO DIVISION**

12 AVAYA INC., a Delaware corporation,
 13 Plaintiff,

14 v.

15 RAYMOND BRADLEY PEARCE, a/k/a
 "BRAD" PEARCE, an individual; JASON
 16 HINES, an individual and doing business as
 DBSI and TELBEST.COM; DEDICATED
 17 BUSINESS SYSTEMS INTERNATIONAL
 LLC, doing business as DBSI.NET, a New
 18 Jersey limited liability company; ATLAS
 SYSTEMS, INC., doing business as
 19 ATLASPHONES.COM and "THE
 TELECOM DEALER," a Michigan
 20 corporation; US VOICE AND DATA, LLC,
 f/k/a TRI-STATE COMMUNICATION
 21 SERVICES LLC, a New Jersey limited
 liability company; SHARKFISH CORP., an
 22 Oklahoma corporation; FEATURECOM INC.,
 a Canadian corporation; STEVE GERACI, an
 23 individual; TOM CONROY, an individual;
 24 METROLINE INC., a Michigan corporation;
 TELCOM INTERNATIONAL TRADING
 PTE. LTD. a Singapore business entity; and,
 DOES 11 through 50, inclusive,

25 Defendants.

CASE NO. 3:19-cv-00565-SI

**THIRD AMENDED COMPLAINT FOR
 DAMAGES AND INJUNCTIVE RELIEF
 FOR:**

1. **FEDERAL TRADEMARK INFRINGEMENT AND COUNTERFEITING, 15 U.S.C. § 1114;**
2. **FEDERAL UNFAIR COMPETITION, 15 U.S.C. § 1125;**
3. **FEDERAL DIRECT AND INDIRECT COPYRIGHT INFRINGEMENT, 17 U.S.C. §§ 501 et seq.;**
4. **VIOLATIONS OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, 17 U.S.C. §§ 1201. et seq. ;**
5. **VIOLATIONS OF THE COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. §§ 1030, et seq. ;**
6. **VIOLATIONS OF THE COMPUTER DATA ACCESS AND FRAUD ACT, CAL. PENAL CODE § 502;**
7. **VIOLATIONS OF 18 U.S.C. § 2318; and,**
8. **UNJUST ENRICHMENT/ RESTITUTION/CONSTRUCTIVE TRUST**

Demand for Jury Trial

Plaintiff AVAYA INC. (“Avaya” or “Plaintiff”) hereby complains and alleges against Defendants RAYMOND BRADLEY PEARCE, a/k/a “BRAD” PEARCE (“Pearce”); JASON HINES, for himself and doing business as DBSI and TELBEST.COM (“Hines”); DEDICATED BUSINESS SYSTEMS INTERNATIONAL LLC, doing business as DBSI.NET (“DBSI”); ATLAS SYSTEMS, INC. doing business as ATLASPHONES.COM and “THE TELECOM DEALER” (“Atlas”); US VOICE AND DATA, LLC, f/k/a TRI-STATE COMMUNICATION SERVICES LLC (“Tri-State”); SHARKFISH CORP. (“Sharkfish”); FEATURECOM INC. (“Featurecom”); STEVE GERACI (“Geraci”); TOM CONROY (“Conroy”); METROLINE INC. (“Metroline”); TELCOM INTERNATIONAL TRADING PTE. LTD. (“Telcom”)¹; and, DOES 11 through 50, inclusive (collectively “Defendants”), as follows.

INTRODUCTION

1. For years, Defendants have been perpetrating a massive illegal software piracy operation, which resulted in the theft and subsequent resale of thousands of unauthorized Avaya Internal Use Software Licenses (“Internal Use Licenses”) to end customers duped into buying pirated software, rather than buying genuine Avaya software licenses through authorized Avaya distribution channels.

2. Long-term Avaya employee Defendant Pearce, in collusion with former Avaya authorized reseller Defendant Hines, willfully resold and distributed, and facilitated the further distribution and resale of, thousands of Avaya Internal Use Licenses – worth millions of dollars – all without Avaya’s authorization, knowledge, or consent. The Internal Use Licenses were created by Pearce by entering Avaya’s computer system using his employee account, as well as Avaya employee accounts hijacked by Pearce that had been doctored to conceal the scheme and to avoid internal controls. Pearce and Hines then covertly distributed the stolen Internal Use Licenses

¹ As alleged in more detail below, Telcom at least trafficked in over a thousand counterfeit Avaya-branded products, however, to ensure that Avaya’s allegations are clear, at this point, Avaya’s allegations against Telcom do not include stolen and/or infringing software license sales, like for the other Defendants.

1 through their own companies, as well as through numerous other resellers, including at least
 2 Defendants Atlas, Featurecom, Geraci, Conroy, and Metroline.

3 3. Adding to the injury, Defendant Atlas has been caught not only offering for sale
 4 and distributing these pirated Internal Use Licenses, but in addition, reselling over a thousand
 5 counterfeit “Avaya” branded phones, as well as apparently genuine Avaya phones – marketed and
 6 sold as “new” – that were repackaged and resold with counterfeit labels that closely mimicked
 7 genuine Avaya factory labels and bore counterfeit Avaya trademarks. Atlas has identified newly-
 8 added Defendant Telcom as the source for the counterfeit “Avaya” branded phones that Avaya has
 9 uncovered thus far.

10 4. Defendants’ unlawful schemes, as alleged in more detail below, have not only
 11 caused Avaya significant monetary damages, but also they have significantly undermined Avaya’s
 12 brand, goodwill, and reputation with customers. Thousands of end customers have been duped
 13 into believing they were receiving a genuine high-quality Avaya product, rather than a counterfeit
 14 and otherwise infringing product, and/or a lawful software license, rather than pirated software
 15 license that conveys no actual license rights at all to the end customer.

16 5. Of course, none of these unlawful and infringing products and software licenses
 17 should ever have been sold/resold at all, nor should any be sold/resold in the future. Accordingly,
 18 Avaya brings this Action to put a stop to Defendants’ unlawful and infringing conduct, to enjoin
 19 further unlawful and infringing conduct, and to recover full damages for the significant harm they
 20 have caused.

21 PARTIES

22 6. Avaya is, and at all times mentioned herein was, a Delaware corporation, with its
 23 principal place of business at 4655 Great America Parkway, Santa Clara, California. Avaya owns
 24 the trademarks that are used in marketing and selling Avaya-branded products and the copyrights
 25 in the Avaya software infringed by Defendants.

26 7. Avaya is informed and believes, and thereon alleges, that Defendant Pearce is an
 27 Oklahoma resident, residing in Tuttle, Oklahoma. Defendant Pearce was an employee of Avaya
 28 from 2000 to 2018, working in an Avaya call center in Oklahoma City, Oklahoma. Avaya is

1 further informed and believes, and thereon alleges, that Defendant Pearce did business through
 2 one or more eBay accounts, as well as through Defendant Sharkfish, an Oklahoma corporation.
 3 with a business address of 310 West Main St., Tuttle, Oklahoma, including business related to the
 4 unlawful conduct alleged herein. Defendant Sharkfish was previously identified as DOE
 5 Defendant No. 1 in the original Complaint in this Action. Avaya is further informed and believes,
 6 and thereon alleges, that Defendant Pearce at various points in time used the alias “Terri Jenkins”
 7 or “TJ” in performing the unlawful activities alleged further herein.

8 8. Avaya is informed and believes, and thereon alleges, that Defendant Hines is a
 9 New Jersey resident, residing in Caldwell, New Jersey. Avaya is informed and believes, and
 10 thereon alleges, that Defendant Hines is the owner and operator of Defendant Dedicated Business
 11 Systems International LLC, doing business as www.dbsi.net and also known as “DBSI”. Avaya is
 12 informed and believes, and thereon alleges, that Defendant DBSI is a New Jersey Limited
 13 Liability Company with its principal place of business in Fairfield, New Jersey and offices in New
 14 York City. Avaya is further informed and believes, and thereon alleges, that Defendant Hines has
 15 done, and continues to do, business under the fictitious business names of TelBest (TelBest.com),
 16 Direct Business Systems International LLC, Empire Telephone LLC, and US Tel, LLC. A
 17 number of these fictitious business names appear to have been at one time registered with New
 18 Jersey or New York by Defendant Hines, although none of these business names currently appears
 19 to be an active business entity in New York or New Jersey. Avaya is further informed and
 20 believes, and thereon alleges, that Defendant Hines at various points in time used one or more
 21 aliases, including “Chad Johnson,” in performing the unlawful activities alleged further herein.

22 9. Avaya is informed and believes, and thereon alleges, that Defendant Tri-State was a
 23 New Jersey limited liability company with its principal place of business in Fairfield, NJ.
 24 Defendant Tri-State was previously identified as DOE Defendant No. 2 in the original Complaint.
 25 Avaya is informed and believes, and thereon alleges, that Defendant Hines is the primary
 26 individual conducting business through Defendant Tri-State, including using the alias “Chad
 27 Johnson.” Avaya is informed and believes, and thereon alleges, that Defendant Tri-State has
 28 recently changed its name, and therefore continues to do business under the current business name

1 of US Voice and Data, LLC.

2 10. Avaya is informed and believes, and thereon alleges, that Defendant Atlas is a
 3 Michigan corporation, with its principal place of business in Auburn Hills, Michigan, with an
 4 online store at atlasphones.com. Avaya is informed and believes, and thereon alleges, that
 5 Defendant Atlas also operates an eBay store using the dba “The Telecom Dealer,” under the eBay
 6 seller name thetelecomdealer, and leveraged the eBay platform, which is located in San Jose,
 7 California, in the course of its business including the infringing business alleged in this Complaint.

8 11. Avaya is informed and believes, and thereon alleges, that former Defendant
 9 Telephone Man is a Florida limited liability company, with its principal place of business in Plant
 10 City, Florida, with an online store at telephonemanofamerica.com. Avaya is informed and
 11 believes, and thereon alleges, that Defendant Telephone Man operates an eBay store, under the
 12 seller name telephonemanofamerica, and leveraged the eBay platform, which is located in San
 13 Jose, California, in the course of its business including the infringing business alleged in this
 14 Complaint. Avaya is informed and believes, and thereon alleges, that Defendant Kelly Petry is the
 15 owner and operator of Telephone Man, and in that capacity authorized, directed, and participated
 16 in the Telephone Man’s infringements, and therefore when Avaya alleges conduct by Telephone
 17 Man below, that includes Defendant Petry. Defendant Petry was previously identified as DOE
 18 Defendant No. 3 in the original and amended Complaints.

19 12. Avaya is informed and believes, and thereon alleges, that former Defendant
 20 Telecom Spot is a Texas business entity, with an online store at thetelecomspot.com, and with its
 21 principal place of business in Austin, Texas.

22 13. Avaya is informed and believes, and thereon alleges, that Defendant Featurecom is
 23 a Canadian corporation with its principal place of business in Ontario, Canada, and with United
 24 States offices in at least Pompano Beach, Florida. Defendant Featurecom was previously
 25 identified as DOE Defendant No. 4 in the original and amended Complaints. Avaya is informed
 26 and believes, and thereon alleges, that Defendant Steve Geraci is the President of Featurecom, and
 27 in that capacity authorized, directed and participated in Featurecom’s infringements, and therefore
 28 when Avaya alleges conduct by Featurecom below, that includes Defendant Geraci. Defendant

Geraci was previously identified as DOE Defendant No. 5 in the original and amended Complaints.

14. Avaya is informed and believes, and thereon alleges, that Defendant Conroy is an individual, residing in San Diego, California. Avaya is informed and believes, and thereon alleges, that Defendant Conroy is an individual, residing in San Diego County, California. Avaya is informed and believes, and thereon alleges, that Defendant Conroy does business under the fictitious business names Avaya Business Resale, AB Resale, www.abrnow.com, or ABR. Defendant Conroy was previously identified as DOE Defendant No. 6 in the original and amended Complaints.

15. Avaya is informed and believes, and thereon alleges, that former Defendant Drew Telecom is a Michigan corporation with its principal place of business in Plainwell, Michigan. Former Defendant Drew Telecom was previously identified as DOE Defendant No. 7 in the original and amended Complaints. Avaya is informed and believes, and thereon alleges, that former Defendant Andrew Roach is the President of Drew Telecom, and in that capacity authorized, directed and participated in Drew Telecom's infringements, and therefore when Avaya alleges conduct by Drew Telecom below, that includes Defendant Roach. Former Defendant Roach was previously identified as DOE Defendant No. 8 in the original and amended Complaints.

16. Avaya is informed and believes, and thereon alleges, that Defendant Metroline is a Michigan corporation, with its principal place of business in Troy, Michigan, with an online store at www.metrolinedirect.com. Defendant Metroline was previously identified as DOE Defendant No. 9 in the original and amended Complaints.

17. Avaya is informed and believes, and thereon alleges, that Defendant Telcom is a Singapore business entity, with its principal place of business in Singapore, with an active online store at www.telcom-int.com including an online shop that markets "Avaya" branded products for sale, including purported "new" Avaya branded phones (*see, e.g.*, <http://telcom-int.com/product/new-avaya-9608g-ip-voip-gigabit-deskphone-700505424-with-1-year-warranty/>). Avaya is informed and believes, and thereon alleges, that Defendant Telcom's counterfeit

1 “Avaya” branded phones sales were sold in such large quantities that it was foreseeable and
 2 intended that such phones would be resold nationwide, including into California, and indeed, some
 3 of the returned counterfeit phones at issue in this Action were returned from California customer
 4 locations. Further, Defendant Telcom maintains a Facebook page, which is located in this
 5 District, which Telcom uses to advertise and promote its products to customers, including those in
 6 this District. Defendant Telcom was previously identified as DOE Defendant No. 10 in the
 7 original and amended Complaints.

8 18. The true names and capacities, whether individual, corporate, associate, or
 9 otherwise, of the Defendants named herein as DOES 11 through 50, inclusive, are unknown to
 10 Avaya who, therefore, sues said Defendants by such fictitious names. Avaya will amend this
 11 Complaint to reflect the true names and capacities of these DOE Defendants when the same shall
 12 have been fully and finally ascertained.

13 19. Avaya is informed and believes, and thereon alleges, that each of the Defendants
 14 designated herein as a DOE is legally responsible, in some manner, for the events and happenings
 15 herein referred to, and legally caused damages to Avaya as herein alleged.

16 20. Avaya is informed and believes, and thereon alleges, that at all times relevant to
 17 this action, each Defendant, including those fictitiously named Defendants, was the agent, servant,
 18 employee, partner, joint venturer, accomplice, conspirator, alter ego or surety of the other
 19 Defendants and was acting within the scope of that agency, employment, partnership, venture,
 20 conspiracy, or suretyship with the knowledge and consent or ratification of each of the other
 21 Defendants in doing the unlawful activities alleged in this Complaint.

JURISDICTION

22
 23 21. This is an Action founded upon violations of Federal trademark and copyright laws,
 24 pursuant to 15 U.S.C. §§ 1051, *et seq.*, 17 U.S.C. §§ 501, *et seq.*, and 17 U.S.C. §§ 1201, *et seq.*
 25 In addition, this Action is founded upon violations of the Computer Fraud and Abuse Act, 18
 26 U.S.C. § 1030, as well as violations of 18 U.S.C. § 2318. This Court has original subject matter
 27 jurisdiction over this Action pursuant to 28 U.S.C. §§ 1331 and 1338(a)-(b), and 15 U.S.C. §
 28 1121. This Court has supplemental jurisdiction over Avaya’s state law claims for relief pursuant

1 to 28 U.S.C. §§ 1338(b) and 1367 because the claims are so related to Avaya’s claims under
 2 Federal law that they form part of the same case or controversy and derive from a common
 3 nucleus of operative facts.

4 22. This Court has personal jurisdiction over Defendants because each Defendant, in
 5 participating in the scheme to create and/or distribute the stolen Internal Use Licenses, has
 6 willfully infringed intellectual property rights of Avaya, a known forum resident, including by
 7 trafficking in pirated Avaya software and otherwise causing tortious injury to Avaya, including to
 8 its trademarks and copyrights, within California, and within this District in particular. Defendants
 9 did so with knowledge that Avaya was located in California. Further, Defendants have performed
 10 intentional acts expressly aimed at Avaya in this forum and thereby caused damage that they knew
 11 would be suffered by Avaya in this forum. In addition, Defendants (other than Telcom) have
 12 marketed, advertised, and offered infringing Avaya software licenses for sale into California and,
 13 upon information and belief, transacted other business within California specifically related to the
 14 infringing distribution scheme. Defendants have also misrepresented the authentic nature of the
 15 counterfeit and/or otherwise infringing “Avaya” products to residents of California, including
 16 within this District. Defendants engaged in the unlawful conduct alleged in this Complaint, with
 17 knowledge that Avaya is located in California. Further, the reseller Defendants, including, but not
 18 limited to, Metroline specifically distributed software infringing Avaya’s copyrights and other
 19 intellectual property rights in California.

20 23. Further as to Defendants Hines, DBSI, Tri-State, and Featurecom, they are former
 21 Avaya partners, and were well aware that the effects of their unlawful conduct would be directed
 22 at and suffered by Avaya in California, and knew that Avaya’s principal place of business is
 23 located in Santa Clara, California. Indeed, in accessing Avaya’s Avaya Direct International
 24 (“ADI”) software license portal, numerous Defendants, including specifically Hines, and DBSI
 25 and Tri-State through Hines, agreed to terms of use, which required a click to accept on the same
 26 page as the link to Avaya’s terms of use, which explicitly set forth exclusive jurisdiction in the
 27 Northern District of California and further made clear that Avaya is headquartered in Santa Clara,
 28 California.

VENUE

24. Venue for this action properly lies in the Northern District of California pursuant to 28 U.S.C. § 1391(b)(2) because Defendants committed acts here in furtherance of their illegal business operations, a substantial part of the events giving rise to the claim occurred in this District, and a substantial part of the property that is the subject of this action is located within this District. Further, Defendants have either sold or offered to sell the infringing software licenses at issue in this Action into this District and/or knowing such software would be resold into this District. Further, Defendants' acts of infringement are likely to have caused, and are likely to continue to cause, consumer confusion within this District. Further, venue is also proper in this District under 28 U.S.C. § 1400(a) because Defendants are subject to personal jurisdiction here due to having performed intentional acts expressly aimed at the forum and thereby caused damage that they knew would be suffered by Avaya in this District. Further, in accessing Avaya's ADI software license portal, numerous Defendants, including specifically Hines, and DBSI and Tri-State through Hines, explicitly agreed to Northern District of California as a proper forum for disputes between the parties.

INTRA-DISTRICT ASSIGNMENT

25. In accordance with LR 3-2(c), this Action is properly assigned on a district-wide basis because it relates to Intellectual Property.

FACTUAL ALLEGATIONS RELATING TO AVAYA AND ITS IP

26. Avaya is a subsidiary of Avaya Holdings Corporation, a publicly traded U.S.-based multinational business communications company headquartered in Santa Clara, California. Avaya was spun off from Lucent Technologies in 2000. Avaya provides an extensive portfolio of hardware, software, and services for contact center and unified communications, such as voice and video calling, audio conferencing, and mobility solutions. Avaya provides communications solutions to a broad range of companies, from small businesses to large multinational enterprises and government organizations. As of 2018, Avaya had a presence in approximately 180 countries worldwide and has in the past three fiscal years conducted business with more than 90% of the Fortune 100 organizations.

27. As of the filing of the prior amended complaint, Avaya's annual sales were approximately \$3 billion and it employed approximately 8,100 employees, of whom nearly 2,800 are located in the United States. Avaya sells its products and services directly to customers and indirectly through thousands of contractually-authorized channel partners, which account for approximately 70% of total product revenue. For indirect sales through partners, Avaya utilizes a two-tiered distribution structure wherein Avaya sells directly to a relatively small number of authorized distributors that are required to sell only to contractually-authorized resellers. Those resellers are contractually obligated to sell directly to end-user customers.

28. Avaya products and services include software, hardware, professional and support services, and cloud services. Among Avaya's product offerings, Avaya offers a product called IP Office ("IPO"), a scalable mid-market and small business telephone system which supports anywhere from five to thousands of users at up to 150 different physical locations. Currently, there are five "editions" of IPO, each of which entail increasing features and capabilities. All editions require per-endpoint software licensing, meaning each phone or computer on the system must be licensed in the IPO software. Additional features, such as voicemail, require additional software licenses on a per-endpoint basis. Thus, each individual phone on a customer's system may be licensed to several feature sets and enabled by multiple software licenses. These IPO software licenses are sold by Avaya and its authorized partners, and then distributed to the licensed end users through unique software license keys.

29. Avaya has developed a strong name and reputation within the trade and among members of the consuming public as a leading provider of contact center and unified communications solutions, including hardware and software of the highest quality. Avaya has invested substantial effort and resources to develop and promote public recognition of the Avaya trade name and of the family of Avaya-related marks. Avaya has used the family of Avaya trademarks to identify goods and services as being genuine Avaya products, and the Avaya marks and name are well-recognized signifiers of Avaya's high quality products, software, and related services (the Avaya marks and name are hereinafter referred to as "Avaya Marks").

30. Avaya has caused several Avaya Marks to be registered on the Principal Register of

the U.S. Patent and Trademark Office in connection with a range of telecommunications, computer hardware, and software products and services, and Avaya owns all rights, title, and interest in numerous federal trademark registrations, including at least:

Mark	Registration Number	Registration Date
AVAYA	2,697,002	March 18, 2003
AVAYA	2,696,985	March 18, 2003

31. Avaya has also expended significant resources and effort to develop and promote public recognition of the Avaya trade name and the family of Avaya-related marks throughout the world, in part by placing Avaya Products and Avaya Marks in its advertising and promotional materials, which reach global consumers through a variety of media, including television, radio, newspapers, magazines, billboards, social media, and the internet.

32. Avaya has taken substantial steps and expended significant resources to research and develop strict quality-control standards for all of its products to ensure that products, software, and services bearing Avaya Marks continue to be of the highest quality.

33. As a result of Avaya's extensive advertising and promotional efforts and its continuous use of its core Avaya Marks for more than 15 years, Avaya has attained one of the highest levels of brand recognition. As a result of Avaya's longstanding and widespread use and promotion of Avaya Marks, Avaya's customers worldwide have come to rely upon Avaya Marks to identify Avaya's high-quality goods and services, including software. Many of Avaya's products are purchased by the U.S. Government, including branches of the military, and by other industries, for use in critical applications.

34. Avaya has also expended significant resources and effort to research and develop world-class software products that enable, enhance, and interoperate with its high-quality hardware. Avaya has caused numerous Avaya software copyrights to be registered with the U.S. Copyright Office in connection with its IP Office products, including but not limited to:

Title	Copyright Number	Date
Avaya IP Office R9.0	TX0008595990	2013
Avaya IP Office R9.1	TX0008592908	2014

Avaya IP Office R10.0	TX0008592913	2016
Avaya IP Office R10.1	TX0008660283	2017
Avaya IP Office R11.0	TX0008655667	2018

35. The above software copyright registrations include the copyrighted software covering the Avaya IP Office software licenses referred to in the Complaint above and below.

36. In addition, Avaya has instituted certain technological measures to control access to its copyright-protected software, including the software identified above. One of those technological measures is the use of software license keys that control access to the Avaya software, including but not limited to the registered software listed above.

FURTHER FACTUAL ALLEGATIONS RELATED TO THE UNLAWFUL SCHEME

37. Avaya has recently uncovered a large scale unlawful conspiracy, which generated millions of dollars of profit at Avaya's expense based upon the creation and distribution of thousands of pirated Avaya Internal Use Only, copyright-protected software licenses.

38. Avaya does not sell its software at all, and certainly does not authorize third parties to sell its software on third-party marketplaces. Instead, Avaya offers its software to be licensed through authorized channels, not including third-party marketplaces. Further, all Avaya software is subject to an End User License Agreement ("EULA"), which licenses that software to a specific end user for use only by that end user and is generally non-transferrable. Avaya's EULA is attached hereto as Exhibit A and incorporated into this Complaint. Avaya is further informed and believes, and thereon alleges, that certain Defendants, including at least Atlas, Featurecom, and Metroline, have been purporting to resell, further transfer, and distribute Avaya software licenses, obtained either from a prior end user, another reseller, or an authorized Avaya partner, none of whom have any license rights to transfer an Avaya software license to a third party reseller for further distribution. The further resale, transfer, and distribution of such software licenses by these Defendants violates Avaya's EULA, and in doing so, further infringes Avaya's copyrights.

39. Adding further injury, Defendants have also been selling stolen Avaya software licenses in competition with authorized and licensed Avaya software and trading off of Avaya's trademarks to do so, by misrepresenting the source of the software licenses as being "new"

software from Avaya. Thus, the use of the Avaya marks by Defendants was not intended to describe the product, but rather to make it appear that the software license was sanctioned, endorsed, and authorized for distribution and resale by Avaya:



1 40. The stolen Avaya software licenses that Defendants (other than Defendant Telcom)
2 were distributing illegally as “new,” genuine and authorized software were discovered to primarily
3 be Internal Use Licenses that Defendant Pearce stole from Avaya by abusing his own internal
4 access to Avaya’s systems and further by using multiple, hijacked employee accounts. Pearce’s
5 primary job responsibility at Avaya was to assist with the resolution of customer support issues,
6 which included generation of Internal Use Licenses for various administrative purposes.
7 Legitimate Internal Use Licenses are sometimes needed to support Avaya’s customers who have
8 properly licensed software from Avaya. From a functionality perspective, Internal Use Licenses
9 are no different from the software licenses delivered to Avaya’s paying customers; however,
10 Internal Use Licenses are billed to Avaya at no cost, rather than the sale price to Avaya’s
11 distributor or end-customer, as would otherwise occur.

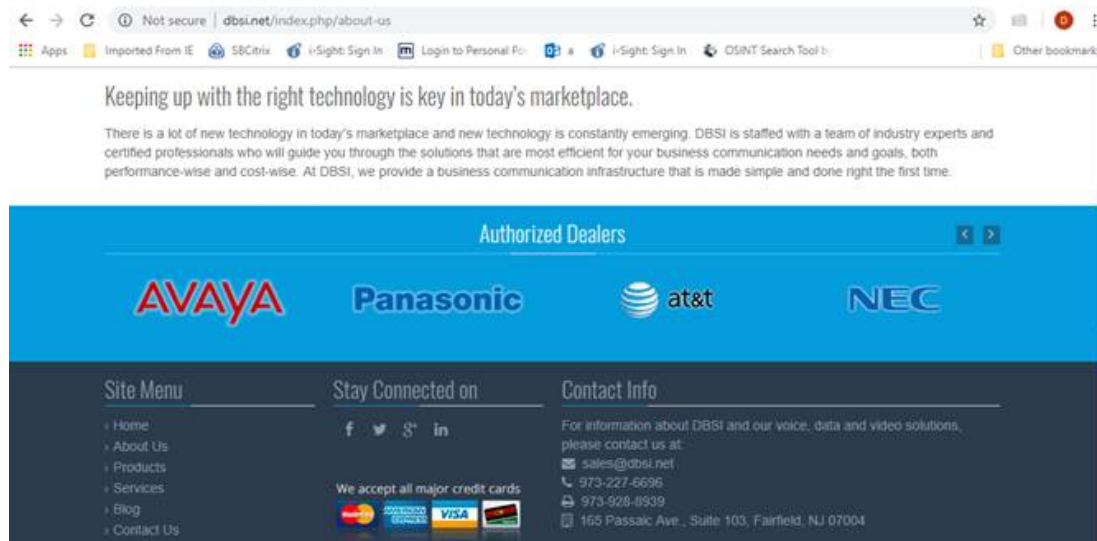
12 41. For years, Pearce generated Internal Use Licenses for thousands of Avaya customer
13 systems, of which – Avaya is informed and believes, and thereon alleges – included millions of
14 dollars in stolen Internal Use Licenses distributed without Avaya’s authorization, as there is no
15 associated revenue, no related customer orders, and no logical business explanation for the
16 magnitude of Pearce’s software license generation. Through purchasing sample software licenses
17 resold by certain Defendants, Avaya was able to track the generation of these infringing and illegal
18 software licenses back to Pearce. To accomplish this theft, Pearce accessed the Avaya software
19 license generation system far beyond his authorization and in completely unauthorized ways,
20 including by issuing licenses himself for unauthorized sale to third parties as well as by hijacking
21 accounts tied to former employees and/or contractors and then activating, controlling, and
22 leveraging those additional accounts in order to steal even more software licenses and avoid
23 internal controls Pearce knew were in place.

24 42. Avaya is further informed and believes, and thereon alleges, that Pearce used
25 Defendant Sharkfish, one or more eBay seller names, and the aliases “Terri Jenkins” and “TJ,” in
26 the course of distributing these stolen Internal Use Licenses and to funnel the ill-gotten gains back
27 to himself.

28 43. Defendant Pearce was then in contact with at least Hines to distribute the stolen

Avaya Internal Use Licenses. Defendant Hines would then access, beyond his authorization, the ADI system in order to download the Internal Use Licenses generated by Pearce and distribute them, or facilitate their distribution, to end customers or other third party resellers, including at least Defendants DBSI, Tri-State, Atlas, Featurecom, Geraci, Conroy, Metroline, and former Defendants Telecom Spot, Telephone Man, and Drew Telecom.

44. Defendant DBSI, run by Hines, was previously an authorized Avaya reseller; however, DBSI's reseller agreement was terminated by Avaya in 2013. This termination placed DBSI and Hines on a "removed reseller" list and de-authorized partner access to Avaya's license key systems, including ADI. However, even though Defendants DBSI and Hines knew they no longer had partner authorization from Avaya for Avaya's license key systems, they continued to access Avaya's software license portals, including ADI, beyond their authorization in order to distribute the stolen Internal Use Licenses. In addition to this access beyond authorization, DBSI and Hines falsely claimed on their website, DBSI.net, to be an Avaya "Authorized Dealer," and specifically used Avaya's Marks to further the false claim of endorsement and authorization by Avaya:



45. Defendant Hines, through his companies DBSI, TelBest, and Defendant Tri-State, as well as through numerous other online resellers, including at least Defendants Atlas, Metroline, Featurecom, Geraci, and Conroy, and former Defendants Telecom Spot, Telephone Man, and Drew Telecom, then each distributed and/or facilitated the distribution of these pirated Internal

1 Use Licenses to thousands of end user customers, in exchange for millions of dollars. In order to
 2 effectuate distribution of the pirated Internal Use Licenses to end customers, Defendants Hines
 3 and DBSI accessed Avaya's ADI system – beyond their authorization – using log-in credentials,
 4 that had been enabled by an authorized Distributor. Avaya is also informed and believes, and
 5 thereon alleges, that Defendants Hines and DBSI shared their ADI log-in credentials with other
 6 resellers and customers in order to allow them to quickly process orders of the pirated Internal Use
 7 Licenses for end customers. Logging into the ADI system, for example, requires a user to click-
 8 to-accept, and includes a link to the ADI terms of use on the same page confirming the accessing
 9 party's acceptance such terms. The "click-to-accept" languages also requires the accessing party
 10 to agree that it has a valid contract, *e.g.* a business partner agreement, with Avaya or an authorized
 11 Avaya Distributor. Further, it appears that while Hines and DBSI are located in New Jersey, in
 12 furtherance of the scheme described in this Complaint, their login credentials were also leveraged
 13 by individuals or entities located in several other states and countries in order to download stolen
 14 Internal Use Licenses created by Pearce, including but not limited to Auburn Hills, Michigan,
 15 Austin, Texas, and Tampa/Largo, Florida (which is adjacent to Plant City, Florida), and believed
 16 to have been used by, at a minimum, Defendants Atlas and Metroline.

17 46. Test buys and reviews of the Defendants' websites and online storefronts
 18 confirmed that Defendants Hines, through his companies DBSI, TelBest, and Tri-State, as well as,
 19 at least, Defendants Atlas and former Defendants Telecom Spot and Telephone Man all offered
 20 these pirated Internal Use Licenses for sale online, representing that the corresponding software
 21 was "new" and genuine Avaya software, which was fully licensed and authorized by Avaya. Such
 22 representations in connection with the resale of these pirated Internal Use Licenses are false and
 23 misleading, as pirated software licenses do not convey any actual license rights to the purchaser.

24 47. Sales data related to Defendant Pearce has further revealed that Defendants
 25 DBSI/Hines, Featurecom, Geraci, and Conroy, and at least former Defendants Drew Telecom and
 26 Telephone Man each paid Pearce substantial sums of money directly in exchange for the stolen,
 27 Internal Use Licenses, which Avaya is informed and believes, such Defendants then turned around
 28 and resold to other resellers and/or unwitting end customers.

48. Meanwhile, the end customers who purchased the infringing software from Defendants are now unwittingly also infringing Avaya's copyrights by running the Avaya software without any valid license. Avaya is further harmed by sales of such unlicensed software, as Avaya then must support these customers regarding software that they never actually licensed from Avaya.

49. After the sale had been consummated, Defendants continued to represent that such Internal Use Licenses were valid and authorized by Avaya, including by, for example, using Avaya's trade name and Avaya Marks to imply endorsement and/or authorization by Avaya. For example, the following was included in an email from former Defendant Telecom Spot distributing the Avaya software:

AVAYA

Excel spreadsheet and macro to reformat downloaded Licence Key files for printing in a more readable format.

Please save the contents of the Zip file to a directory first
Open the File with the name starting as "RUN"
Click the Button "Create All Views"

This will create additional work sheets as follows:

All keys - all data from the download is presented with column filters to allow selection of data if required
Single sheet print - is a printable list that will print each different serial number or certificate on a separate page, use "file/print"
nnnnnnn.csv - IP Office Manager import format. One sheet will be created for each serial number and an nnnnnnn.csv file saved to disk. Rename to 'keys.txt' for import via IP Office SD card.

50. In addition to leveraging access to the "legacy" DBSI log-in credentials for the ADI system, Avaya is informed and believes, and thereon alleges, that Defendant Hines took further steps to circumvent Avaya's access controls by creating one or more fake identities, including "Chad Johnson," and a separate company, Defendant Tri-State, in order to further facilitate the scheme to access and distribute the pirated Internal Use Licenses.

51. Tri-State became an authorized Avaya partner partway through Defendants' scheme, on May 13, 2014. Unbeknownst to Avaya at the time, and hereon alleged upon information and belief, Tri-State is a company created either by Defendant Hines or at his direction for the primary purpose of allowing Hines additional access to Avaya's ADI system and Product Licensing and Delivery System ("PLDS") in order to distribute the stolen Internal Use Licenses. The PLDS system allows a user to "upgrade" older versions of Avaya licenses that have been previously downloaded through the ADI system. While Hines, through DBSI, had retained some access to Avaya's PLDS system, DBSI/Hines could not order upgrades for the stolen

1 Internal Use Licenses after Avaya had terminated DBSI as an Avaya partner. Avaya is informed
 2 and believes, and thereon alleges, that by leveraging Tri-State's partner access to PLDS,
 3 Defendants Hines/DBSI were able to, for example, download an older "R9" license from ADI (a
 4 pirated Internal Use License that had been stolen and created by Pearce) and upgrade it to a newer
 5 ("R10" or "R11") version of the software through PLDS in order to meet an end customer's needs.
 6 This allowed Defendants Hines, DBSI, and Tri-State to obtain "R10" and "R11" licenses at little
 7 or no cost as a result of abusing the PLDS upgrade process with stolen Internal Use Licenses.

8 52. Defendants Hines, DBSI and Tri-State all agreed to abide by Avaya's Terms of Use
 9 of its systems each time they logged on to ADI and PLDS. These Terms of Use provide that
 10 access to and use of Avaya's websites are subject to the Terms of Use and that each user agrees
 11 not to use Avaya's websites "in a manner that is actually or potentially false, inaccurate,
 12 misleading . . . [or] harmful" and that the user will not, among other things: "misrepresent an
 13 affiliation with, or otherwise impersonate, any person or organization; [or] download a file or
 14 software . . . that [the user] know[s], or [has] reason to believe, cannot be distributed legally over
 15 the [w]ebsite; [or] take any action to circumvent or attempt to circumvent the security and access
 16 control measures of the [w]ebsite; [or] "distribute, reproduce, duplicate, copy, transfer, modify,
 17 license, sell, trade, or resell any content, unless Avaya expressly agrees otherwise in writing." *See*
 18 Avaya ADI Terms of Use as of March 18, 2016. The Terms of Use also explicitly identify
 19 Avaya's headquarters in Santa Clara, California. In logging in to ADI, Hines, DBSI, and Tri-State
 20 also agreed "that the terms and conditions of [their] contract with Avaya or Avaya Distributor (as
 21 applicable) shall govern this transaction." Further, any other Defendant leveraging Hines'
 22 credentials to access Avaya's systems and download stolen Internal Use Licenses, including, on
 23 information and belief, Defendants Atlas and Metroline, would have had to agree to be bound by
 24 these Terms of Use as well.

25 ////

26 ////

27 ////

28 ////

53. In addition to the above, an employee of Tri-State who went by the name “Chad Johnson” used his ADI and PLDS credentials to download and upgrade pirated Internal Use Licenses created by Pearce on numerous occasions. “Chad Johnson” also used his PLDS credentials to upgrade stolen Internal Use Licenses that had been initially downloaded by Hines at DBSI. Hines has now admitted that “Chad Johnson” is a false name used by Hines, and that Hines was the individual in control of “Chad Johnson’s” ADI and PLDS accounts. Hines has also admitted that DBSI and Tri-State share an office at 165 Passaic Avenue in Fairfield, New Jersey:



54. Hines has also admitted that he called in to Avaya’s customer support line on at least two separate occasions, once claiming to be “Chad Johnson” of Tri-State and another time claiming to be “Justin Albaum,” a purported employee of Tri-State, who also had Avaya system credentials under Tri-State’s account and who accepted the Avaya reseller agreement on behalf of Tri-State. Tri-State’s reseller agreement with Avaya was terminated for cause on February 14, 2019.

55. Defendants Pearce, Sharkfish, Hines, DBSI, and Tri-State thereby willfully and

1 knowingly infringed Avaya's copyrights and trademarks, and the other reseller defendants,
 2 including at least Defendants Atlas, Metroline, Featurecom, Mr. Geraci, and Mr. Conroy either
 3 acted willfully and knowingly in supporting this unlawful scheme or with willful blindness and
 4 complete disregard for the harm caused to Avaya and its end customers as a result of their direct
 5 and substantial involvement in enabling this vast illegal operation and in thereby infringing
 6 Avaya's intellectual property. Defendants are each jointly and severally liable for their direct and
 7 substantial involvement in, and actions taken in support of, the alleged infringing distribution
 8 chain, and each Defendant profited handsomely for their part in this scheme. Defendants are also
 9 indirectly liable for the infringement related to their downstream customers due to Defendants'
 10 conduct alleged above in (i) controlling the distribution of infringing products and directly
 11 profiting therefrom, and (ii) knowingly inducing, causing, and/or materially contributing to the
 12 infringing activity of their downstream customers.

FURTHER FACTUAL ALLEGATIONS RELATED TO ATLAS PHONES

14 56. Avaya has also recently uncovered additional direct infringement and
 15 counterfeiting by Defendant Atlas, doing business as Atlasphones.com. In or about mid-2016,
 16 Avaya was informed about a purchase of over a thousand Avaya phone systems by an end
 17 customer, which were represented as "new" Avaya IP Phones. The end customer complained of a
 18 high rate of failure of these "Avaya" branded IP Phones. Upon analysis, over a thousand of these
 19 supposedly new "Avaya" IP Phones turned out to be counterfeit, based on the associated data for
 20 the phones. Upon further analysis of a sample of the phones, these counterfeit phones not only
 21 had fake serial numbers and fake manufacturing codes, but also had internal components that had
 22 been hacked and programmed to bypass internal software controls. This large sale of counterfeit
 23 Avaya products traced back to Atlas, and Atlas has now identified Defendant Telcom as the source
 24 of these counterfeit "Avaya" branded IP Phones. This is but one example of Atlas' counterfeiting,
 25 and therefore, Avaya is informed and believes and thereon alleges that, if left unchecked, Atlas
 26 will continue to resell counterfeit products with impunity.

27 57. In addition, Avaya has confirmed through additional test purchases that Atlas is
 28 also purchasing gray market Avaya products originally sold overseas in bulk and then repackaging

1 and reselling these previously sold phones as “new.” To convince their end customers that the
 2 phones are new and authorized by Avaya, Atlas sells these phones in new packaging that
 3 counterfeits the Avaya Marks and tradename and that counterfeits Avaya’s genuine factory seals
 4 with counterfeit factory labels that closely mimic genuine Avaya factory labels.

5 **ADDITIONAL FACTUAL ALLEGATIONS RELATED TO CONFUSION**

6 58. The above unlawful conduct has a high likelihood of causing substantial consumer
 7 confusion, and Avaya is informed and believes and thereon alleges, that Defendants’ illegal
 8 conduct caused significant actual consumer confusion. In looking at the online sites through
 9 which Defendants made their sales, neither those sites nor the customer reviews for Defendants’
 10 license sales shows any acknowledgment of the illicit nature of the software licenses being bought
 11 and sold, and therefore reflects the confusion by these customers about the lack of authorization
 12 and lack of genuineness of these “Avaya” branded software license sales. Further, as to
 13 Defendants Atlas and Telcom, the purchase of thousands of counterfeit phones by end customers
 14 similarly reflects a belief by the customer that they were purchasing genuine Avaya phones, and
 15 were not aware the products Atlas and Telcom sold were counterfeit. Avaya is informed and
 16 believes, and thereon alleges, that Defendants intentionally and willfully traded on Avaya’s
 17 Marks, reputation, and goodwill to increase Defendants’ sales by causing consumers to believe
 18 that their unlawful product and software sales were somehow associated with, affiliated with, and
 19 authorized by, Avaya, when they are not, and when the unlawful products and/or software, as
 20 alleged in detail above, are non-genuine and/or are counterfeit within the meaning of the Lanham
 21 Act.

22 **AVAYA’S CLAIMS FOR RELIEF**

23 **FIRST CLAIM FOR RELIEF**

24 **Federal Trademark Infringement and Counterfeiting**

25 ***15 U.S.C. § 1114***

26 **(Against All Defendants)**

27 59. Avaya incorporates the preceding paragraphs of this Complaint as if fully set forth
 28 herein.

1 60. The Avaya Marks are valid, protectable trademarks that have been registered as
2 marks on the principal register in the United States Patent and Trademark Office.

3 61. Avaya is the owner and registrant of the Avaya Marks.

4 62. As described in more detail above, each Defendant has used the Avaya Marks in
5 connection with the marketing, promotion, and sale of goods without Avaya's consent, in a
6 manner that is likely to cause, and has actually caused, confusion and/or mistake, or that has
7 deceived members of the consuming public and/or the trade. Further, each Defendant has, at a
8 minimum, created or distributed stolen Internal Use Licenses (which are "Avaya" products)
9 without Avaya's authorization, and such goods are not considered "genuine" within the definition
10 of the Lanham Act. And, as alleged further above, Defendants Atlas and Telcom have
11 counterfeited and/or trafficked in, at a minimum, over a thousand counterfeit "Avaya" branded
12 products. Indeed, Defendants' counterfeiting and infringing activities are likely to cause and are
13 actually causing confusion, mistake, and deception among members of the trade and the general
14 consuming public as to the origin, sponsorship, and quality of Defendants' infringing products,
15 counterfeit packaging, and infringing software licenses. As of the filing of this Complaint, Avaya
16 is informed and believes that Defendants are continuing to infringe the Avaya Marks unabated as
17 alleged further above. As such, each Defendant has engaged in both trademark infringement and
18 counterfeiting under 15 U.S.C. § 1114.

19 63. Defendants' infringement of the Avaya Marks is willful and their conduct, as
20 alleged herein, constitutes an exceptional case under 15 U.S.C. § 1117.

21 64. Avaya has been, and continues to be, damaged by Defendants' infringement,
22 including by suffering irreparable harm through the diminution of trust and goodwill among
23 Avaya consumers and members of the general consuming public and the trade. Avaya has no
24 adequate remedy at law. As a result of Defendants' infringement of the Avaya Marks, Avaya is
25 entitled to an injunction, and an order of destruction of all of Defendants' infringing materials.

26 65. As a direct and proximate result of their infringements, Defendants have realized
27 unjust profits, gains, and advantages at the expense of Avaya, including as set forth above. In
28 addition, Avaya has suffered substantial loss and damages to its property and business, including

significant monetary damages as a direct and proximate result of Defendants' infringements, including as set forth above. The harm caused by Defendants' unlawful conduct entitles Avaya to recovery of all available remedies under the law, including but not limited to actual damages, infringers' profits, treble damages, statutory damages (if elected), reasonable attorney fees, costs, and prejudgment interest.

SECOND CLAIM FOR RELIEF

Federal Unfair Competition

15 U.S.C. § 1125(a)

(Against All Defendants)

66. Avaya incorporates each of the foregoing paragraphs of this Complaint as if fully set forth herein.

67. Each Defendant did, without authorization, use in commerce the Avaya Marks, and also make false designations of origin, false or misleading descriptions of fact, and/or false or misleading representations of fact, which were and are likely to cause confusion, or to cause mistake, or to deceive customers as to the affiliation, connection, or association of Defendants with Avaya, and/or as to the origin, sponsorship, or approval of the Defendants' goods, services, or commercial activities.

68. Avaya alleges on information and belief that Defendants' acts have been committed with knowledge of Avaya's exclusive rights and goodwill in Avaya Marks, as well as with willfulness, bad faith, and the intent to cause confusion, mistake and/or to deceive. Defendants' conduct, as alleged herein, constitutes an exceptional case under 15 U.S.C. § 1117.

69. Defendants' unauthorized use of counterfeit copies of Avaya's Marks falsely represents Defendants' counterfeit "Avaya" products as emanating from, or being authorized by, Avaya and places beyond Avaya's control the quality of products bearing Avaya Marks.

70. Avaya has been, and continues to be, damaged by Defendants' infringement, including by suffering irreparable harm through the diminution of trust and goodwill among Avaya consumers and members of the general consuming public and the trade. Avaya has no adequate remedy at law. As a result of Defendants' infringement of the Avaya Marks, Avaya is

entitled to an injunction, and an order of destruction of all of Defendants' infringing materials.

71. As a direct and proximate result of their infringements, Defendants have realized unjust profits, gains and advantages at the expense of Avaya, including as set forth above. In addition, Avaya has suffered substantial loss and damages to its property and business, including significant monetary damages as a direct and proximate result of Defendants' infringements, including as set forth above. The harm caused by Defendants' unlawful conduct entitles Avaya to recovery of all available remedies under the law, including but not limited to actual damages, infringers' profits, treble damages, statutory damages (if elected), reasonable attorney fees, costs, and prejudgment interest.

THIRD CLAIM FOR RELIEF

Federal Direct and Indirect Copyright Infringement

17 U.S.C. §§ 501, et seq.

(Against All Defendants, Except Telcom)

72. Avaya incorporates each of the foregoing paragraphs of this Complaint as if fully set forth herein.

73. Avaya's copyrighted software contains a substantial amount of original material (including without limitation code, specifications, documentation and other materials) that is copyrightable subject matter under the Copyright Act, 17 U.S.C. §§ 101, *et seq.* Avaya owns valid copyrights in the IPO software, including but not limited to U.S. Copyright Reg. Nos. TX0008595990, TX0008592908, TX0008592913, TX0008660283, and TX0008655667.

74. Without consent, authorization, approval, or license, each Defendant knowingly, willingly, and unlawfully copied, prepared, published, and distributed Avaya's copyrighted works, portions thereof, and/or derivative works of the same, constituting direct copyright infringement.

75. As alleged above, each Defendant distributed numerous stolen/pirated copies of Avaya's copyright-registered software without authorization and in violation of Avaya's copyrights. Such distribution and use was not licensed. Further, Avaya is informed and believes, and thereon alleges, that certain Defendants, including at least Defendants Atlas, Metroline and Featurecom, and Geraci, have purported to resell, transfer, and further distribute Avaya software

1 licenses, obtained either from a prior end user, from another reseller or from an authorized partner,
 2 none of whom had any license rights to transfer an Avaya software license to a third party reseller
 3 for further distribution. The further resale, transfer, and distribution of such software licenses by
 4 these Defendants violates Avaya's EULA, and in doing so, further infringes Avaya's copyrights,
 5 as alleged herein.

6 76. In addition, in further distributing such invalid Avaya software licenses, each
 7 Defendant has thereby induced, caused, and materially contributed to the infringing acts of their
 8 customers by encouraging, inducing, allowing and assisting them to use, copy, and distribute
 9 Avaya's copyrighted works, and works derived therefrom. As such, each Defendant has engaged
 10 in both direct and indirect copyright infringement in violation of Section 501 of the Copyright Act.

11 77. Defendants' direct and indirect infringements are, and have been, knowing and
 12 willful. By this unlawful copying, use, and distribution, Defendants have violated Avaya's
 13 exclusive rights under 17 U.S.C. § 106 of the Copyright Act.

14 78. Avaya is entitled to an injunction restraining Defendants from engaging in any
 15 further such acts in violation of the United States copyright laws. Unless Defendants are enjoined
 16 and prohibited from infringing Avaya's copyrights, inducing others to infringe Avaya's
 17 copyrights, and unless all infringing software, including but not limited to all pirated software
 18 license keys, is seized and impounded pursuant to Section 503 of the Copyright Act, Defendants
 19 will continue to intentionally infringe and induce infringement of Avaya's registered copyrights.

20 79. Defendants' aforesaid conduct is causing immediate and irreparable injury to
 21 Avaya and to Avaya's goodwill, and will continue to damage Avaya unless enjoined by this Court.
 22 Avaya has no adequate remedy at law. As a direct and proximate result of their infringements,
 23 Defendants have realized unjust profits, gains and advantages at the expense of Avaya, including
 24 as set forth above. In addition, Avaya has suffered substantial loss and damages to its property
 25 and business, including significant monetary damages as a direct and proximate result of
 26 Defendants' infringements, including as set forth above. The harm caused by Defendants'
 27 unlawful conduct entitles Avaya to recovery of all available remedies under the law, including but
 28 not limited to actual damages, infringers' profits, statutory damages (if elected), reasonable

1 attorney fees, costs, and prejudgment interest.

2 **FOURTH CLAIM FOR RELIEF**

3 **Violations of the Digital Millennium Copyright Act**

4 *17 U.S.C. §§ 1201, et seq.*

5 **(Against All Defendants)**

6 80. Avaya incorporates each of the foregoing paragraphs of this Complaint as if fully
7 set forth herein.

8 81. Avaya's has registered copyrights in its software.

9 82. Avaya employs many technological measures to effectively control access to its
10 copyright-protected software, including but not limited to software license keys.

11 83. Each Defendant has circumvented technological measures that Avaya put in place
12 to effectively control access to Avaya's copyright-protected software. The pirated Internal Use
13 Licenses that Defendants have sold online avoid, bypass, decrypt, and deactivate a technological
14 protection measure without Avaya's authority for the purpose of gaining unauthorized access to
15 Avaya's copyrighted works. Further, at least Defendants Hines, DBSI, and Tri-State have
16 accessed Avaya's electronic systems without or in excess of their authorization in order to obtain
17 and distribute the stolen Internal Use Licenses.

18 84. As alleged further above, each Defendant has also offered to the public, provided or
19 otherwise trafficked in pirated Internal Use Licenses, which constitutes technology that is
20 primarily designed or produced for the purpose of either circumventing Avaya's technological
21 protection measures that effectively control access to copyrighted works, or allowing third parties
22 to access Avaya's copyrighted works without authorization. Such pirated Internal Use Licenses
23 have only limited commercially significant purpose or use other than to circumvent a
24 technological protection measure that effectively controls access to copyrighted works, or are
25 marketed by Defendant for use in circumventing a technological protection measure that
26 effectively controls access to copyrighted works.

27 85. Further, as alleged above, at least Defendants Atlas and Telcom have trafficked in
28 "Avaya" branded counterfeit phones with internal components, which were hacked and

1 programmed to bypass internal software controls.

2 86. Defendants have realized significant profit by virtue of their circumvention of
 3 Avaya's technological protection measures and trafficking in technology to circumvent those
 4 measures. Further, Avaya has sustained economic damage as a result of Defendants'
 5 circumvention of technological protection measures and trafficking in technology to circumvent
 6 those measures in an amount to be proven at trial.

7 87. Avaya is therefore entitled to an injunction restraining Defendants from engaging
 8 in any further such acts in violation of the United States copyright laws. Defendants' aforesaid
 9 conduct is causing immediate and irreparable injury to Avaya and to Avaya's goodwill, and will
 10 continue to damage Avaya unless enjoined by this Court. Avaya has no adequate remedy at law.
 11 Unless Defendants are enjoined and prohibited from infringing Avaya's copyrights, inducing
 12 others to infringe Avaya's copyrights, and unless all pirated software license keys are seized and
 13 impounded pursuant to 17 U.S.C. Section 1203, Defendants will continue to be able to circumvent
 14 technological measures to effectively control access to Avaya's copyright-protected software and
 15 to traffic in technology to circumvent Avaya's technological protection measures.

16 88. Defendants' acts of software access control circumvention, alleged further above,
 17 are and have been knowing and willful. As a direct and proximate result of their infringements,
 18 Defendants have realized unjust profits, gains and advantages at the expense of Avaya, including
 19 as set forth above. In addition, Avaya has suffered substantial loss and damages to its property
 20 and business, including significant monetary damages as a direct and proximate result of
 21 Defendants' infringements, including as set forth above. The harm caused by Defendants'
 22 unlawful conduct entitles Avaya to recovery of all available remedies under the law, including but
 23 not limited to actual damages, infringers' profits, statutory damages (if elected), reasonable
 24 attorney fees, costs, and prejudgment interest.

25 **FIFTH CLAIM FOR RELIEF**

26 **Violation of the Computer Fraud and Abuse Act**

27 *18 U.S.C. §§ 1030, et seq.*

28 **(Against Defendants Pearce, Hines, DBSI, and Tri-State)**

89. Avaya incorporates each of the foregoing paragraphs of this Complaint as if fully set forth herein.

90. Avaya's computer systems are involved in interstate and/or foreign commerce and communication, and are protected computers under 18 U.S.C. § 1030(e)(2).

91. Defendants Pearce, Hines, DBSI, and Tri-State(together the "Computer Fraud Defendants") knowingly and intentionally accessed Avaya's computer systems without authorization or in excess of authorization.

92. Leveraging that access, the Computer Fraud Defendants obtained and used valuable information from Avaya's protected computers in transactions involving interstate or foreign commerce and/or communications. This information included pirated and/or stolen Internal Use Licenses, as well as password and other login information to enable them to hijack and leverage other user accounts.

93. Thus, the Computer Fraud Defendants also knowingly, willfully, and with an intent to defraud accessed Avaya's computers without authorization or in excess of authorization and obtained valuable information from Avaya's computers that the Computer Fraud Defendants used to obtain something of value. The Computer Fraud Defendants also knowingly, willfully, and with an intent to defraud trafficked in login information through which Avaya computers were accessed without authorization, affecting interstate commerce.

94. Avaya has suffered irreparable harm and injuries resulting from the Computer Fraud Defendants' conduct, which harm will continue unless the Computer Fraud Defendants are enjoined from further unauthorized access of Avaya's protected computers. Avaya has no adequate remedy at law.

95. The Computer Fraud Defendants' conduct has caused a loss to Avaya during a one-year period in excess of \$5,000. Avaya has been harmed by the Computer Fraud Defendants' actions, including but not limited to being forced to expend significant resources to investigate the unauthorized access and abuse of its computer network and to address the harm to Avaya and its computer network caused by that unlawful conduct. The harm caused by the Computer Fraud Defendants' unlawful conduct entitles Avaya to recovery of all available remedies under the law,

including but not limited to damages and equitable relief.

SIXTH CLAIM FOR RELIEF

Violations of the California Computer Data Access and Fraud Act

California Penal Code § 502

(Against Defendants Pearce, Hines, DBSI, and Tri-State)

96. Avaya incorporates each of the foregoing paragraphs of this Complaint as if fully set forth herein.

97. The Computer Fraud Defendants knowingly accessed and without permission used data from Avaya's computers, computer systems, and/or computer network in order to devise and/or execute a scheme to defraud and deceive in violation of California Penal Code § 502(c)(1). The Computer Fraud Defendants knowingly accessed and without permission took, copied, and/or used data from Avaya's computers, computer systems and/or computer network in violation of California Penal Code § 502(c)(2). The Computer Fraud Defendants knowingly and without permission used or caused to be used Avaya's computer services in violation of California Penal Code § 502(c)(3). The Computer Fraud Defendants knowingly accessed and without permission altered and added data to Avaya's computers, computer systems, and/or computer network in violation of California Penal Code § 502(c)(4). The Computer Fraud Defendants knowingly and without permission accessed or caused to be accessed Avaya's computers, computer systems, and/or computer network in violation of California Penal Code § 502(c)(7).

98. Avaya suffered and continues to suffer damage as a result of the Computer Fraud Defendants' violations of the California Penal Code § 502 identified above.

99. The Computer Fraud Defendants' conduct also caused irreparable harm and injuries to Avaya, and, unless enjoined, will cause further irreparable injury, for which Avaya has no adequate remedy at law. Avaya is therefore entitled to an injunction restraining the Computer Fraud Defendants from engaging in any further such acts in violation of the law.

100. The Computer Fraud Defendants willfully violated California Penal Code § 502 in disregard and derogation of Avaya's rights, and their actions as alleged above were carried out with oppression, fraudulent intent, and malice.

101. The harm caused by the Computer Fraud Defendants' unlawful conduct entitles Avaya to recovery of all available remedies under the law, including but not limited to compensatory damages, punitive or exemplary damages, reasonable attorney fees, costs, and prejudgment interest.

SEVENTH CLAIM FOR RELIEF

Trafficking In Counterfeit Or Illicit Labels

18 U.S.C. § 2318

(Against All Defendants, Except Telecom)

102. Avaya incorporates each of the foregoing paragraphs of this Complaint as if fully set forth herein.

103. 18 U.S.C. § 2318 provides in pertinent part that it is a federal crime for persons to knowingly traffic in counterfeit or illicit labels, documentation, or packaging accompanying a copy of a computer program. Any copyright owner who is injured, or is threatened with injury, by a violation of 18 U.S.C. § 2318(a) may bring a civil action.

104. In order to access and run Avaya's copyright protected software, licensees must validate their copies of Avaya's software with license keys that are generated through Avaya's computer systems. The license keys are encrypted alphanumeric codes that are encoded with the authorized software features that have been licensed and a unique serial number of a memory card that is physically inserted into the Avaya-built server running the Avaya software. In this way, the Avaya software license keys are designed to distribute Avaya software to licensed end users and to prevent distribution, copying, and infringement by unlicensed users or in excess of a user's license. Further, because these Avaya software license keys control the access to Avaya's software and because these license entitlements are tracked internally by Avaya, these Avaya software license keys also enable Avaya to verify whether a particular copy of its software installed on a user's system is counterfeit or infringing, or being used without Avaya's permission.

105. Avaya's software license keys are identifying labels accompanying and designed to accompany copies of Avaya's computer programs. The pirated Avaya Internal Use Licenses that Defendants all trafficked in constitute illicit labels within the meaning of 18 U.S.C. § 2318, as

1 they are genuine licensing documents that are used by Avaya to verify that a copy of a computer
 2 program is not infringing of any Avaya copyright. Defendants knowingly trafficked in illicit
 3 labels by distributing pirated Avaya Internal Use Licenses. As further alleged above, Defendants
 4 Pearce, Sharkfish, Hines, DBSI, and Tri-State were willfully and knowingly trafficking in
 5 counterfeit or illicit labels, documentation, or packaging accompanying a copy of a computer
 6 program. Hines, DBSI, Tri-State, Featurecom, and Drew Telecom were authorized partners and
 7 therefore knew how Avaya software licenses were distributed through Avaya's authorized
 8 distribution channels. Hines, DBSI, and Tri-State therefore knew, or were willfully blind to the
 9 fact, that the distribution of Avaya software and the illicit labels accompanying it, obtained
 10 through Pearce, was not legal, authorized, or permitted by Avaya.

11 106. Further, the other reseller Defendants, including at least Atlas, Metroline,
 12 Featurecom, Geraci, and Conroy, also acted willfully and knowingly in supporting this unlawful
 13 scheme or with willful blindness and complete disregard for the harm caused to Avaya and its end
 14 customers as a result of their direct and substantial involvement in enabling this vast illegal
 15 operation and in thereby infringing Avaya's intellectual property. These reseller Defendants,
 16 including at least Atlas, Metroline, Featurecom, Geraci, and Conroy, knew or should have known
 17 that the Avaya software and the accompanying illicit labels they were trafficking in were not
 18 authorized or permitted by Avaya. These reseller Defendants, including at least Atlas, Metroline,
 19 Featurecom, Geraci, and Conroy, were not buying the stolen Internal Use Licenses through
 20 Avaya's authorized distribution channels, which means they knew or should have known that the
 21 further resale of such licenses was not authorized and in violation of Avaya's software license
 22 restrictions on transfer and/or resale. These reseller Defendants, including at least Atlas,
 23 Metroline, Featurecom, Geraci, and Conroy, were purchasing the stolen Internal Use Licenses
 24 from Pearce and/or Hines, knowing, or with willful blindness to the fact, that they were trafficking
 25 in illicit or counterfeit labels by doing so. Avaya is informed and believes, and thereon alleges,
 26 that these stolen Internal Use Licenses were being resold by Pearce and Hines (including, at least,
 27 through Sharkfish, DBSI, and Tri-State) at prices that were often below Avaya's own internal
 28 pricing to its authorized distributors, which is of course well below the price that Avaya's

1 authorized distributors could then sell to end users. As such, no one, and certainly not resellers
 2 who have done any business with respect to Avaya products, could possibly believe in good faith
 3 that such Avaya software and the illicit labels accompanying them had been authorized or
 4 permitted by Avaya.

5 107. Further, as alleged further above, Avaya is informed and believes, and thereon
 6 alleges, that individuals or entities in Austin, Texas, Auburn Hills, Michigan, and Tampa/Largo,
 7 Florida, (the locations of Atlas, Telephone Man, and Telecom Spot and therefore likely connected
 8 with or employed by these reseller defendants) were directly themselves leveraging the log-in
 9 credentials unlawfully used by Defendants Hines and DBSI, as alleged further above to download
 10 and/or otherwise facilitate the distribution of the pirated Internal Use Licenses, showing further
 11 knowledge that the Avaya software and the illicit labels accompanying them were not legal,
 12 authorized, or permitted by Avaya.

13 108. Defendants' acts in the commission of the above unlawful conduct used or intended
 14 to use interstate and/or foreign commerce. Further, the Avaya software license keys must
 15 accompany the delivery of Avaya software, as without the license key the Avaya software will not
 16 operate.

17 109. Defendants' conduct in violation of 18 U.S.C. § 2318 alleged above are, and have
 18 been, knowing and willful. Defendants' aforesaid conduct is causing immediate and irreparable
 19 injury to Avaya and to Avaya's goodwill, and will continue to damage Avaya unless enjoined by
 20 this Court. Avaya has no adequate remedy at law. Avaya is entitled to an injunction restraining
 21 Defendants from engaging in any further such acts in violation of 18 U.S.C. § 2318. Unless
 22 Defendants are enjoined and prohibited from such conduct, and unless all illicit and/or counterfeit
 23 labels, including but not limited to all pirated software license keys, are seized and impounded
 24 pursuant to 18 U.S.C. § 2318, Defendants will continue to traffic in such illicit and/or counterfeit
 25 labels.

26 110. As a direct and proximate result of their unlawful conduct in violation of 18 U.S.C.
 27 § 2318, Defendants have realized unjust profits, gains and advantages at the expense of Avaya,
 28 including as set forth above. In addition, Avaya has suffered substantial loss and damages to its

property and business, including significant monetary damages as a direct and proximate result of Defendants' infringements, including as set forth above. The harm caused by Defendants' unlawful conduct entitles Avaya to recovery of all available remedies under the law, including but not limited to actual damages, infringers' profits, statutory damages (if elected), reasonable attorney fees, costs, and prejudgment interest.

EIGHTH CLAIM FOR RELIEF

Unjust Enrichment/Restitution/Constructive Trust

Common Law

(Against All Defendants)

111. Avaya incorporates paragraphs 1-33, 39-71, and 89-110 of this Complaint as if fully set forth herein, specifically excluding any allegations from those paragraphs that form the basis of Avaya's copyright claims in this Action.

112. Each Defendant unjustly received benefits at the expense of Avaya through their wrongful conduct in infringing Avaya's trademarks, counterfeiting Avaya's trademarks, and trafficking in counterfeit or illicit labels as alleged further above. Further, the Computer Fraud Defendants unjustly received benefits at the expenses of Avaya through their wrongful access to Avaya's technological systems and circumvention of Avaya's security controls. Defendants continue to unjustly retain these benefits at the expense of Avaya. The unjust receipt of the benefits obtained by Defendants lacks any adequate legal basis and thus cannot conscientiously be retained by Defendants. Therefore, the circumstances of the receipt and retention of such benefits are such that, as between Avaya and Defendants, it is unjust for Defendants to retain any such benefits. As alleged above, Defendants' wrongful conduct and retention of the unjust benefits obtained through that wrongful conduct was willful and undertaken with fraudulent intent.

113. The harm caused by the Defendants' unlawful conduct entitles Avaya to recovery of all available remedies under the law, including but not limited to full restitution of all amounts and/or other benefits in which Defendants have been unjustly enriched at Avaya's expense, in an amount to be proven at trial, and/or imposition of a constructive trust over such amounts in favor of Avaya, as well as punitive or exemplary damages, reasonable attorney fees, costs, and

1 prejudgment interest to the fullest extent available under the law.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Avaya respectfully prays that the Court enter judgment as follows:

4 A. For entry of judgment holding Defendants liable for their unlawful conduct,
5 including but not limited to their infringement of Avaya copyrights and trademarks set forth
6 above;

7 B. For an order preliminarily and permanently enjoining Defendants, their officers,
8 agents, servants, employees, attorneys, and affiliated companies, their assigns and successors in
9 interest, and those persons in active concert or participation with them, from any continued or
10 further acts of counterfeiting or infringement of any Avaya trademarks and/or copyrights,
11 including inducing infringement by any other party, as well as from further acts of unfair
12 competition, trafficking in illicit and/or counterfeit labels, and/or circumvention of Avaya
13 technological measures controlling access to its copyright-protected software, and enjoining the
14 Computer Fraud Defendants from their officers, agents, servants, employees, attorneys, and
15 affiliated companies, their assigns and successors in interest, and those persons in active concert or
16 participation with them, from any continued or further acts of computer fraud;

17 C. For an order that any counterfeit or infringing products, or derivative works
18 therefrom, including but not limited to all unlicensed Avaya software and/or unauthorized Avaya
19 software licenses, as well as any illicit and/or counterfeit labels in Defendants' possession,
20 custody, or control, be seized, impounded, and transferred to Avaya or to the Court or destroyed,
21 pursuant to 15 U.S.C. § 1118, 17 U.S.C. §§ 503 & 1203, and/or 18 U.S.C. § 2318;

22 D. For an order from the Court that an asset freeze and/or constructive trust be
23 imposed over all monies and profits in Defendants' possession, custody, or control, which
24 rightfully belongs or should be restored or delivered to Avaya;

25 E. For Avaya's damages according to proof resulting from Defendants' unlawful and
26 infringing conduct as alleged above as well as Defendants' profits to the fullest extent available
27 under the law;

28 F. For statutory damages to the fullest extent available under the law and to the extent

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SAN FRANCISCO, CALIFORNIA 94111-3711

- 1 elected by Avaya prior to the rendering of final judgment;
- 2 G. For prejudgment interest;
- 3 H. For reasonable attorney fees and costs to the fullest extent available under the law;
- 4 I. For treble damages, enhanced damages, punitive damages, and/or exemplary
- 5 damages to the fullest extent available under the law;
- 6 J. For full restitution, including but not limited to restoration of all property
- 7 unlawfully taken from Avaya, as well as any ill-gotten gains from the unlawful conduct alleged
- 8 above;
- 9 K. For an order that Avaya be awarded injunctive, specific performance, and other
- 10 provisional remedies, as appropriate; and,
- 11 L. For such other and further relief as the Court deems just and proper.

12 DATED: February 5, 2021

SIDEMAN & BANCROFT LLP

By: /s/ Zachary J. Alinder

Zachary J. Alinder
Attorneys for Plaintiff
AVAYA INC.

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JURY DEMAND

Pursuant to Civ. L.R. 3-6 and Fed. R. Civ. Proc. 38, Plaintiff Avaya Inc. hereby demands a trial by a jury on all issues herein so triable.

DATED: February 5, 2021

SIDEMAN & BANCROFT LLP

By: /s/ Zachary J. Alinder
Zachary J. Alinder
Attorneys for Plaintiff
AVAYA INC.

EXHIBIT A



AVAYA GLOBAL SOFTWARE LICENSE TERMS
REVISED: September 20, 2018

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 - (b) You may only move RTU's to and from Designated Processors or Servers supporting the same Software application;
 - (c) You must reduce the quantity of the licenses on the original Server by the number of RTU's being moved to the new Server;
 - (d) You acknowledge that: (1) You may be charged additional fees when moving RTU's as per Avaya's then-current License Portability Policy, (2) maintenance services do not cover system errors caused by moves not performed by Avaya, (3) You are responsible for any programming, administration, design assurance, translation or other activity to make sure the Software will scale and perform as specified as a result of any license moves, and if any such transfer results in a requirement for Avaya system engineering or requires the use of on-site Avaya personnel, You will be charged the Time and Materials fees for such activity;
 - (e) If Your maintenance coverage differs on licenses on the same product instance at the location of the new Server, service updates, recasts and/or fees may apply and any fee adjustments for differences in coverage will only be made on a going forward basis as of the date Avaya receives notice of the RTU move; and
 - (f) You may move RTU's from one Affiliate to another Affiliate provided that You comply with all of the conditions of this Section, including, without limitation, providing the name and address of the new Affiliate in Your written notice under subpart (a) above, and provided such new Affiliate agrees to be bound by these Software License Terms.

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W. Miscellaneous. These Software License Terms and any dispute, claim or controversy arising out of or relating to these Software License Terms ("**Dispute**"), including without limitation those relating to the formation, interpretation, breach or termination of these Software License Terms, or any issue regarding whether a Dispute is subject to arbitration under these Software License Terms, will be governed by New York State laws, excluding conflict of law principles, and the United Nations Convention on Contracts for the International Sale of Goods.

Any Dispute shall be resolved in accordance with the following provisions. The disputing party shall give the other party written notice of the Dispute. The parties will attempt in good faith to resolve each Dispute within thirty (30) days, or such other longer period as the parties may mutually agree, following the delivery of such notice, by negotiations between designated representatives of the parties who have dispute resolution authority. If a Dispute that arose anywhere other than in the United States or is based upon an alleged breach committed anywhere other than in the United States cannot be settled under these procedures and within these timeframes, it will be conclusively determined upon request of either party by a final and binding arbitration proceeding to be held in accordance with the Rules of Arbitration of the International Chamber of Commerce by a single arbitrator appointed by the parties or (failing agreement) by an arbitrator appointed by the President of the International Chamber of Commerce (from time to time), except that if the aggregate claims, cross claims and counterclaims by any one party against any or all other parties exceed One Million US Dollars at the time all claims, including cross claims and counterclaims are filed, the proceeding will be held in accordance with the Rules of Arbitration of the International Chamber of Commerce by a panel of three arbitrator(s) appointed in accordance with the Rules of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language, at a location agreed by the parties or (failing agreement) ordered by the arbitrator(s). The arbitrator(s) will have authority only to award compensatory damages within the scope of the limitations of these Software License Terms and will not award punitive or exemplary damages. The arbitrator(s) will not have the authority to limit, expand or otherwise modify the terms of these Software License Terms. The ruling by the arbitrator(s) will be final and binding on the parties and may be entered in any court having jurisdiction over the parties or any of their assets. The parties will evenly split the cost of the

arbitrator(s)' fees, but each party will bear its own attorneys' fees and other costs associated with the arbitration. The parties, their representatives, other participants and the arbitrator(s) will hold the existence, content and results of the arbitration in strict confidence to the fullest extent permitted by law. Any disclosure of the existence, content and results of the arbitration shall be as limited and narrowed as required to comply with the applicable law. By way of illustration, if the applicable law mandates the disclosure of the monetary amount of an arbitration award only, the underlying opinion or rationale for that award may not be disclosed.

If a Dispute by one party against the other that arose in the United States or is based upon an alleged breach committed in the United States cannot be settled under the procedures and within the timeframe set forth above, then either party may bring an action or proceeding solely in either the Supreme Court of the State of New York, New York County, or the United States District Court for the Southern District of New York. Except as otherwise stated above with regard to arbitration of Disputes that arise anywhere other than in the United States or are based upon an alleged breach committed anywhere other than in the United States, each party to these Software License Terms consents to the exclusive jurisdiction of those courts, including their appellate courts, for the purpose of all actions and proceedings.

The parties agree that the arbitration provision in this Section may be enforced by injunction or other equitable order, and no bond or security of any kind will be required with respect to any such injunction or order. Nothing in this Section will be construed to preclude either party from seeking provisional remedies, including but not limited to temporary restraining orders and preliminary injunctions from any court of competent jurisdiction in order to protect its rights, including its rights pending arbitration, at any time. In addition and notwithstanding the foregoing, Avaya shall be entitled to take any necessary legal action at any time, including without limitation seeking immediate injunctive relief from a court of competent jurisdiction, in order to protect Avaya's intellectual property and its confidential or proprietary information (including but not limited to trade secrets).

If any provision of these Software License Terms is determined to be unenforceable or invalid, these Software License Terms will not be rendered unenforceable or invalid as a whole, and the provision will be changed and interpreted so as to best accomplish the objectives of the original provision within the limits of applicable law. The failure to assert any rights under the Software License Terms, including, but not limited to, the right to terminate in the event of breach or default, will not be deemed to constitute a waiver of the right to enforce each and every provision of the Software License Terms in accordance with their terms. If you move any Software, and as a result of such move, a jurisdiction imposes a duty, tax, levy or fee (including withholding taxes, fees, customs or other duties for the import and export of any such Software), then you are solely liable for, and agree to pay, any such duty, taxes, levy or other fees.

X. Agreement in English. The parties confirm that it is their wish that these Software License Terms, as well as all other documents relating hereto, including all notices, have been and shall be drawn up in the English language only. Les parties aux présentes confirment leur volonté que cette convention, de même que tous les documents, y compris tout avis, qui s'y rattachent, soient rédigés en langue anglaise.